

SAMUEL M. MULLINAX

IBLA 85-722

Decided February 27, 1987

Appeal from a decision of the Acting Director, Office of Surface Mining Reclamation and Enforcement, ruling that the Birmingham Field Office, Office of Surface Mining Reclamation and Enforcement, responded appropriately to a citizen's complaint alleging that permits were issued contrary to Alabama's surface mining statute.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally -- Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally -- Surface Mining Control and Reclamation Act of 1977: State Program: 10-day Notice to State

When the Office of Surface Mining Reclamation and Enforcement issues a 10-day notice to a state pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(1) (1982), based upon a citizen's complaint which alleges irregularities in the issuance of surface mining permits, and the state responds by demonstrating that the operator and the state complied with relevant provisions of the state's surface mining statute, the Board will affirm the decision of the Acting Director, Office of Surface Mining Reclamation and Enforcement, that the response to the citizen's complaint was appropriate.

APPEARANCES: Samuel M. Mullinax, pro se.

#### OPINION BY ADMINISTRATIVE JUDGE HARRIS

Samuel M. Mullinax has appealed the May 20, 1985, decision of the Acting Director, Office of Surface Mining Reclamation and Enforcement (OSM), responding to his citizen's complaint, dated October 29, 1984, in which he requested OSM to "investigate alleged irregularities committed by the [Alabama Surface Mining Commission (ASMC)]."

The irregularities alleged by appellant involve three permits issued to Central Mining Company (Central) by ASMC for the conduct of surface coal

mining operations in secs. 28, 29, 32, and 33, T. 16 S., R. 9 W., Fayette County, Alabama. ASMC issued Permit No. P-1290 to Central with an effective date of August 2, 1977. The permit was amended twice thereafter on October 7, 1977, and April 19, 1978, to include additional acreage. Permit No. P-1640 was issued to Central with an effective date of August 2, 1978, and Permit No. P-2058 was issued with an effective date of October 26, 1979, and was amended on December 7, 1979, to include additional acreage. All permits and amendments state that the surface estate of the lands described is owned by a certain private party or parties, and that the mineral estate is owned by the First National Bank of Birmingham, as trustee. 1/ In addition, the permits and amendments disclose that Central leased the surface and mineral estates by separate leases dated July 18 and July 13, 1977, respectively.

In his citizen's complaint, appellant asserted that on July 25, 1977, he recorded an affidavit in the ASMC office which showed litigation involving the lands described in the permits issued to Central. 2/ In this affidavit, appellant states:

I claim mineral ownership of the above-described lands and submit that no individual or company has permission to mine thereon. In view of the fact that the mineral ownership is in dispute and is contested, this is to further state as a basis for requesting that no surface mine permit issue for the described lands.

The central allegation in appellant's complaint was that ASMC should not have issued permits or amendments to existing permits after he filed the affidavit. He further alleged the following additional irregularities, most of them related to the issuance of the permits held by Central and amendments thereto:

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1/ The file does not disclose the identity of the beneficiaries of the trust of which First National Bank is trustee. However, the trust corpus apparently includes the mineral estate of the land described in the three permits involved in this appeal, and the permits state that First National Bank of Birmingham has entered into a mineral lease with Central for the mining of the property.

2/ This affidavit, a copy of which is included in the case record but which ASMC denies having received, does not disclose the identity of the parties to the litigation, which involves a dispute as to the beneficial interests in the trust that holds the ownership of the mineral estate of the land embraced by the permits held by Central. Correspondence in the file indicates that this dispute involves "the Mullinax heirs," and that there is "much controversy and conflict between Mr. Mullinax and his sisters."

A letter dated Jan. 15, 1980, from ASMC to Central, states that "the mineral interest \* \* \* [has] been adjudicated to be lawfully possessed by Sam Mullinax." According to a letter dated Jan. 17, 1980, from Charles E. Tweedy, Jr., Esq., to ASMC, the losing parties appealed the State Circuit court decision to the Alabama Supreme Court. The file does not disclose how or whether this litigation has been resolved. However, the Jan. 17 letter states that the parties to the lawsuit had all agreed that Central could continue to mine the coal "and pay the royalty to Tweedy, Jackson & Beech, as Trustees for whoever wins this lawsuit in the Supreme Court."

3. I was refused access to tax records for the years 1977, 1978 and 1979. However, the record shows all mining done in Winston County (Exhibit #8) while mining was still in progress in Fayette County on the above described permits. This constitutes fraud on its face.

4. I was never notified by ASMC of the issuance of any of the abovesaid permits. This is in violation of Act No. 551, of 1975, "The Alabama Surface Mining Reclamation Act."

5. All of the abovesaid permits were issued by the ASMC without documentation of ownership (see permits). Another violation of Act No. 551.

6. Various and numerous documents have been taken from the abovesaid permit files, and are missing to this date.

By letter dated October 31, 1984, OSM issued a 10-day notice to ASMC in accordance with section 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1271(a)(1) (1982), which provides in pertinent part:

Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation. [Emphasis added.]

OSM's 10-day notice informed ASMC that the Secretary had reason to believe Central was in violation of the Act or a permit condition. The notice described the violation as "ISSUANCE OF PERMIT WHERE COMPANY DID NOT HAVE LEGAL RIGHT TO MINE/FAILURE TO NOTIFY SURFACE/MINERAL OWNER OF ISSUANCE OF PERMIT." The 10-day notice referenced the permits as having been issued in violation of sections 7(a)(8), 8(a)(5), and 17(c) of the Alabama Surface Mining Reclamation Act of 1975 (ASMRA), Ala. Code §§ 9-16-36(a)(8), 9-16-37(a)(5), and 9-16-52(c) (1975). 3/

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3/ Ala. Code § 9-16-36(a)(8) (1975) provides:

"(a) An applicant for a license shall file an application with the commission upon a form furnished by the director, which application shall contain the following information:

ASMC responded to the 10-day notice by letter dated November 6, 1984. As a threshold matter, ASMC questioned OSM's jurisdiction to issue a 10-day notice regarding the permits held by Central:

We object to issuance of Ten Day Notice regarding permit P-1290, as this permit was issued August 2, 1977 prior to the effective date of the Federal Surface Mining Control and Reclamation Act and therefore, does not fall under its jurisdiction with respect to Federal Oversight. We would also question OSM jurisdiction on permits P-1640 and P-2058 for the reason that the actions in question, i.e. issuance of permits, occurred prior to State Program Primacy and are irreversible.

Despite the jurisdictional objection, ASMC, in response to the allegation that it failed to enforce section 17(c) of the ASMRA, Ala. Code § 9-16-52(c), which imposes fines against "[a]ny person who willfully misrepresents any fact or willfully gives false information in any application or report required under this article," provided a history of permit issuance and concluded that it complied with ASMRA (referred to by ASMC as Act 551) in issuing those permits:

The complainant alleges an affidavit was recorded with the ASMC Office in Jasper on July 25, 1977 alleging litigation of the described property. No such affidavit and no record of such affidavit exists in ASMC records. The complainant alleges that ASMC violated Act 551 by not issuing notice of filing of permit application to him as a land owner. Act 551, Section VIII (5) [section 8(a)(5) of ASMRA, Ala. Code § 9-16-37 (a)(5) (1975)] requires that the applicant list the legal owners of record and that the Commission give written notice to "such owners" which ASMC did. There is no evidence in ASMC records that we were aware of any

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fn. 3 (continued)

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"(8) A statement by the applicant that he has obtained, or before mining will obtain, from the surface and mineral owner the legal right to mine by surface mining methods, the land to be affected in each permit." Ala. Code § 9-16-37(a)(5) (1975) provides as follows:

"(a) An applicant for a permit shall file an application with the director upon a form furnished by him, which application shall contain or have attached the following:

\* \* \* \* \*

"(5) The names and addresses of the legal owners of record of the surface interest and the coal or mineral interest in the to be affected lands at the time the permit is filed; the commission shall immediately give written notice to such owners of the filing of such permit; \* \* \*." Ala. Code § 9-16-52(c) (1975) provides:

"(c) Any person who willfully misrepresents any fact or willfully gives false information in any application or report required under this article may be fined, in addition to the other fines imposed in this article, not less than \$ 1,000, nor more than \$ 5,000 for each offense."

owners of mineral or surface other than those listed in the permit application at the time of issuance of the permits. In any case, ASMC was not empowered under Act 551 to adjudicate property disputes. Complainant further alleges that the permits were issued without documentation of ownership. Act 551 does not require documentation of ownership.

Correspondence contained in ASMC files further indicates that it was not until January 15, 1980, three months after permit P-2058 was issued, that ASMC was made aware that the Circuit Court of Fayette County had adjudicated the disputed property to be in the possession of Mr. Sam Mullinax. Subsequent correspondence from attorneys involved in the case on January 17, 1980 confirmed the Commission's understanding that the adjudicated owners did not wish to take action to suspend the permit and further that the losing party in the dispute was appealing the case to the Alabama Supreme Court.

In summary our records indicate that the commission complied fully with Act 551 based on information submitted in the permit applications and that to date no evidence has been submitted that there was an attempt to willfully misrepresent any fact or willfully report false information to the Commission. We therefore do not intend to take any action on the basis of this complaint against the permittee. \*  
\* \*

On December 4, 1984, a copy of the above-described letter was sent to appellant, and appellant asserted in a March 14, 1985, letter to OSM that "someone \* \* \* is attempting to pigeon-hole this investigation." OSM treated this March 14, 1985, letter as a request for review of OSM's response to the citizen's complaint. In the May 20, 1985, letter which is the subject of this appeal, OSM explained:

Neither the ASMC under Act 551 nor OSM under the Surface Mining Control and Reclamation Act of 1977 (SMCRA) has the authority to adjudicate property disputes. Therefore, based on these facts, I conclude that the Birmingham Field Office responded in an appropriate manner to your citizen complaint by properly following the procedures set out in Section 521 of SMCRA. In light of the fact that permit P-1290 was issued prior to enactment of SMCRA and permits P-1290, P-1640 and P-2058 were issued prior to approval of the Alabama State Program, OSM's authority in the area of permit issuance is limited.

Appellant's statement of reasons for appeal to this Board does not directly address the issue examined by ASMC, and by OSM in reviewing ASMC's disposition of the citizen's complaint, i.e., that, as alleged in the complaint, the series of permits were improperly issued to Central. Rather, his statement centers upon an allegation that under color of the permits in question Federal coal was mined by Central in Fayette County, Alabama, without being reported, amounting to fraud against the United States.

[1] We will begin by setting forth the legal framework within which to evaluate this appeal. The Alabama State surface mining program was conditionally approved, effective May 20, 1982. From that date, ASMC has been the regulatory authority in Alabama for all surface coal mining and reclamation operations. 30 CFR 901.10 (47 FR 22057 (May 20, 1982)), as amended at 49 FR 7805 (Mar. 2, 1984)).

Section 502 of SMCRA, 30 U.S.C. § 1252 (1982), which outlines the interim program procedures, provides at subsection (a) that, "[n]o person shall open or develop any new or previously mined or abandoned site for surface coal mining operations on lands on which such operations are regulated by a State unless such person has obtained a permit from the State's regulatory authority." The Department's initial program regulations provide as a general performance obligation that "[a] person conducting coal mining operations shall have a permit if required by the State in which he is mining and shall comply with State laws and regulations that are not inconsistent with the Act and this chapter." 30 CFR 710.11(a)(2)(i).

Further, section 502(b) provides that

[a]ll surface coal mining operations on lands on which such operations are regulated by a State which commence operations pursuant to a permit issued on or after six months from August 3, 1977, shall comply, and such permits shall contain terms requiring compliance with, the provisions set out in subsection (c) of this section [environmental protection performance standards].

30 U.S.C. § 1252(b) (1982).

The regulations establish timetables for compliance with the section 502 requirements:

Performance standards obligations. (i) A person who conducts any coal mining operations under an initial permit issued by a State on or after February 3, 1978, shall comply with the requirements of the initial regulatory program. Such permits shall contain terms that comply with the relevant performance standards of the initial regulatory program.

(ii) On and after May 3, 1978, any person conducting coal mining operations shall comply with the initial regulatory program, except as provided in § 710.12 of this part.

(iii) A person shall comply with the obligations of this section until he has received a permit to operate under a permanent State or Federal regulatory program.

30 CFR 710.11(a)(3). As in section 502(a) and (b) of SMCRA, this regulation leaves the matter of permit issuance to the state authority, if there is one with the proviso that such permit "shall contain terms that comply with the relevant performance standards of the initial regulatory program."

Sections 502(d) and 506(a) of SMCRA complete the scheme for permit issuance. Section 502(d) provides that "[n]ot later than two months following the approval of a State program \* \* \* all operators of surface coal mines in expectation of operating such mines after the expiration of eight months from the approval of a State program \* \* \* shall file an application for a permit with the regulatory authority." Section 506(a) is to the same effect. Regulation 30 CFR 773.11(b)(2)(i) sets forth requirements for permits and permit processing under the permanent regulatory program, providing that "[n]ot later than 2 months following the effective date of a permanent regulatory program \* \* \* an application for a permanent regulatory program permit [must be] filed for any operation to be conducted after the expiration of 8 months from such effective date in accordance with the provisions of the regulatory program."

To summarize, during the interim regulatory program, an operator is to obtain a permit if the state where the surface mining is to take place requires such a permit (section 502(a) of SMCRA), and during the permanent regulatory program, an operator must obtain a permit pursuant to the approved state program (sections 502(d) and 506(a) of SMCRA). During both the interim and permanent programs, permit issuance is a matter left to state law. Thus, when appellant alleged permitting irregularities in his complaint, OSM requested ASMC, the authority charged with issuing Central's permits, to review those alleged irregularities. <sup>4/</sup>

It is clear that section 521(a)(1) is primarily designed to address violations of performance standards or permit conditions that would be ascertainable by inspection of the surface coal mining operation. Thus, in Turner

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<sup>4/</sup> The legislative history of SMCRA reflects the perception that the Federal enforcement program was to have limited scope in relation to the issuance of mining permits during the interim program. For example, the "Additional Views of Philip Ruppe, Don Clausen, Robert Lagomarsino", as part of the Report of the Committee on Interior and Insular Affairs, to accompany H.R. 25 in the 94th Congress (the predecessor of H.R. 2 in the 95th Congress, which was enacted as P.L. 95-87), contains the following statements concerning permit issuance:

"Since practically all surface coal mining operations covered by the initial regulatory procedure are presently regulated by existing State authorities (the major exception being operations on federal and Indian lands), it is not the purpose of this interim federal enforcement program to place the Secretary of the Interior in the business of issuing mining permits for operations on lands within the jurisdiction of the States. The bill imposes a duty upon the States to review and revise existing permits to insure compliance with the interim standards of section 501, and obliges the States to issue new permits in accordance with those standards. It is our view, however, that the Secretary would be required to assure State performance of these duties and obligations, pursuant to the federal inspection and enforcement provisions of section 501(f)."

(Emphasis in original.) H.R. Rep. No. 45, 94th Cong., 1st Sess. (1975), at 153.

Brothers v. Office of Surface Mining Reclamation and Enforcement, 92 IBLA 320 (1986), OSM conducted an investigation of a minesite pursuant to a citizen's complaint and issued a 10-day notice to Oklahoma's regulatory authority citing violations of the State's program. OSM determined, and this Board affirmed, that the State's issuance of a notice of violation (NOV), given that the State had issued an NOV a year before for the same violation, did not amount to "appropriate action" under section 521(a)(1).

On the other hand, a citizen's complaint which sets forth allegations of irregularities in the issuance of permits by the State regulatory authority may involve different considerations and consequences than one which alleges violation of a performance standard, such as in Turner Brothers. However, we need not dwell on such differences because in this case the State reviewed the permits to Central and uncovered none of the alleged irregularities. Under the circumstances, OSM acted properly in referring the complaint to the State. Our only other inquiry is whether the State's response was "appropriate action."

Our review of ASMC's response to OSM's 10-day notice, and of OSM's determination that there was an appropriate response to the citizen's complaint, reveals that ASMC's issuance of the contested permits to Central complied with the requirements of Alabama law. The permit applications disclosed the surface and subsurface owners of the property embraced by the permits, and that those owners agreed to Central's mining of the property. There is nothing in the record to support the claims made by appellant. 5/

Based upon the record before us, we rule that OSM properly determined that there had been an appropriate response to the citizen's complaint.

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5/ Appellant's statement of reasons asserts that the "basis of [his] complaint is that fraud was committed against the United States in that coal was mined from property owned by the United States without it being reported." Appellant's complaint did state that "all mining was done in Winston County \* \* \* while mining was still in progress in Fayette County on the above described permits." However, this allegation is not supported by the record before us. OSM's 10-day notice reasonably interpreted the citizen's complaint to allege "irregularities" in the issuance of a series of permits to Central, and ASMC reviewed that complaint accordingly.

The file contains two memoranda from Melvin Wayne Stanley of the Birmingham Field Office, OSM, dated Apr. 4, 1985, in which he notes being called by appellant, who informed him that Central had "mined more land than they were supposed to mine." In addition to asserting that Central had mined his own land, appellant asserted that Central "had mined 8 to 10 feet over onto the government owned mineral." According to the second memorandum, Stanley inspected the minesite and examined the mine maps, and concluded that "the company did not mine more land than they were supposed to mine." Further, he noted that it would be "almost impossible" to determine whether Central had mined the 8 to 10 feet as alleged by appellant.



Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Bruce R. Harris  
Administrative Judge

We concur:

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Franklin D. Arness  
Administrative Judge

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Anita Vogt  
Administrative Judge  
Alternate Member